



April 15, 2004

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: Comments on CG Docket No. 02-278
Frequency for Telemarketer to Access the National Do-Not-Call Registry

Dear Ms. Dortch:

The Mortgage Bankers Association ("MBA")¹ appreciates the opportunity to respond to the Federal Communications Commission's ("FCC") proposed rule to increase the frequency with which businesses must access and employ the National Do-Not-Call Registry ("DNC Registry"). The FCC proposes to amend its regulations implementing the Telephone Consumer Protection Act of 1991 ("TCPA") to require telemarketers to purge from their calling lists, monthly, names that appear on the National Do-Not-Call Registry (the "Registry"). At this time, MBA opposes any FCC action in this area.

Despite no specific legislative mandate to do so, the FCC would impose the very restrictive standard established in the Consolidated Appropriations Act of 2004 on banks, savings associations and other financial institutions subject to its jurisdiction. Assuming that the FCC plans to adopt rules that are identical or substantially similar to those adopted by the Federal Trade Commission ("FTC"), we also must assume that the FCC rule, like the Act, would enable consumers to

¹The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership prospects through increased affordability; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters excellence and technical know-how among real estate finance professionals through a wide range of educational programs and technical publications. Its membership of approximately 2,700 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org <<http://www.mbaa.org>>

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assert a valid complaint thirty days after entering their numbers on the Registry. Currently, telemarketers have 90 days to complete this purge. Changing this time period would be disruptive to the lending industry and produce little benefit for consumers.

MBA and other financial institutions and businesses have contacted members of Congress and their staffs concerning the inequities of the new monthly access requirement. We believe there is considerable congressional concern that a monthly time frame with no implementation time line or grace period is overly burdensome.

We respectfully urge the FCC to postpone any further consideration of a monthly access requirement until Congress has had an opportunity to consider any amendments in this area. MBA submitted comments to the FTC on its rule highlighting the mortgage banking industry's concerns with a "30-day" access rule (the FTC's final rule imposes a 31-day rule). Those comments are attached and would apply equally to the FCC if it plans to move forward with rulemaking on this matter.

MBA does not support a monthly, 30- or 31-day access requirement. However, if the FCC is compelled to act, we urge the FCC to adopt a 30-day grace period in conjunction with a monthly access requirement and to define "monthly" to allow access "once a month" or "once every 31 days."

A grace period is important given the operational complexities of running a call campaign and the fact that those complexities already force many institutions to access the list monthly. Moving to a monthly standard with no grace period will further increase the frequency with which telemarketers must access the Registry. As stated in the attached letter, we believe such a change will result in the need to access the DNC Registry bi-weekly or even weekly in order to avoid violating the rules.

We also support retaining a "monthly" access standard (which can be combined with a "31-day" bright line test). Monthly access allows businesses to set a date every month (such as the first business day of the month) to access the registry. A 31-day rule alone means that the access date changes each month, making compliance more complicated for many.

Unfortunately, the FTC did not adopt a grace period based on its interpretation of the Consolidated Appropriations Act, which is silent on this matter. MBA and other institutions, therefore, are seeking clarification and amendment of the law.

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The FTC also defined "monthly" as requiring access to the DNC Registry every 31-days, thus imposing undue hardships on many companies.

Again, we urge the FCC to postpone action until Congress has had an opportunity to act on the issue of a grace period and the appropriateness of a "monthly" access requirement.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kurt Pfothauer".

Kurt Pfothauer
Senior Vice President
Government Affairs



Submitted Electronically

March 8, 2004

Office of the Secretary
Federal Trade Commission
Room 159-H (Annex D)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Monthly Registry Access, Project No. R411001

To Whom It May Concern:

The Mortgage Bankers Association ("MBA")¹ appreciates the opportunity to submit comments on the Federal Trade Commission's ("FTC") proposed rule implementing the Consolidated Appropriations Act of 2004 (the "Appropriations Act") provision requiring sellers and telemarketers subject to the Telemarketing Sales Rule ("TSR") to purge from their calling lists names that appear on the National Do-Not-Call Registry (the "Registry") every thirty days. According to the proposed rule, the Act also enables consumers to assert a valid DNC complaint thirty days after entering their numbers on the Registry. Currently, telemarketers and sellers have 90 days to complete this purge.

We understand the daunting task placed before the FTC to develop regulations implementing the law by March 23, 2004, and thus, we greatly appreciate your willingness to consider our comments.

The MBA is a trade association representing approximately 2,700 members involved in all aspects of real estate finance. Our members include national and regional lenders, full service mortgage companies, mortgage brokers, mortgage conduits, and service providers. Our membership is diverse and includes independent mortgage companies, national banks, state-chartered banks, savings and loans, and credit unions. The new

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provision in the Appropriations Act is of considerable concern to independent mortgage companies and mortgage brokers, which are subject to the FTC's jurisdiction. Because the law does not apply to national banks, savings associations and other federally regulated institutions, the law creates an unlevel playing field for independent mortgage companies and brokers who must compete for business with these financial institutions.

The lack of congressional debate as to the appropriateness and necessity of reducing the timeframes companies have to recognize new enrollments on the Registry is also troubling. Little, if any, attention was given to the impact of such a change on businesses. We believe this change is premature in light of the fact that the Registry has been in effect for only five months and no study has concluded that changes are warranted.

The law will increase businesses' compliance costs. Not only will mortgage companies be required to access the Registry twelve times a year, rather than four times a year, but they face additional internal and third-party vendor costs. Finally, the shorter timeframe creates greater opportunity for failure and risk of liability for companies, which in good faith, are trying to comply.

We would like to take this opportunity to address several of the items for which the FTC seeks comments.

“30 Days” versus “Once a Month”

The proposed rule states that although the law requires telemarketers to obtain the Registry list “once a month,” such language would allow some to circumvent the intent of the law by obtaining the list on the 30th of the month and again on the 1st of the following month. To avoid this outcome, the FTC proposes to substitute the legislative language requiring companies to obtain a Registry list “once a month” with a requirement that they obtain and employ the Registry list every “30 days.” While MBA supports the 30-day approach as a helpful clarification, businesses should be permitted to pull a Registry list based on a “monthly” schedule. Providing only the “thirty day” approach would prohibit a company from setting a specific date every month to access the Registry. For example, a company would be out of compliance with the provision if it obtained the list on the first business day of every month or the first Monday of every month—both common schedules currently employed. The ability for businesses to set fixed schedules is consistent with the plain language of the law. We believe, therefore, the final rule should allow companies to set a consistent date every month regardless of whether the month contains 28 or 31 days or the time frame between downloads varies between 28 and 36 days. In addition, the final rule should provide the bright line test clarifying that if a company pulls a Registry list every thirty days, and therefore, may not pull a list in February, such a practice does not violate the regulation.

“Obtaining” versus “Employing” the Registry List

The proposed rule amends the safe harbor provision by providing that a seller or telemarketer will not be liable for violating the outbound call restrictions if it can demonstrate that as part of the seller’s or telemarketer’s routine business practice,

“the seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), *employing* a version of the do-not-call registry obtained from the Commission no more than thirty (30) days prior to the date any call is made, and maintains records documenting this process” (emphasis added).

69 Fed. Reg. 7330, 7333 (February 13, 2004). This provision along with the statement in the preamble that a consumer can lodge a complaint 30 days after entering his or her number on the Registry imply that businesses must obtain the Registry list every 30 days and scrub, disseminate and employ it immediately. There is no grace period for implementing the list. Such an interpretation exceeds the standard established by the law and creates significant compliance issues for lenders and other businesses. The Registry list should be effective 30 days after download to provide sufficient time for dissemination and use.

The Appropriations Act provides that the TSR will be amended to require that sellers and telemarketers *obtain* the Registry list once a month. The law does not require that the list be employed immediately, as the proposal suggests. We respectfully request, therefore, that the FTC provide a 30-day implementation or “grace” period before the Registry list becomes effective. This recommendation will avoid the need for businesses to completely alter their business models.

The Impact on Current Business Models

For economic and efficiency reasons, calling campaigns are approximately 45 to 60 days in duration and are initiated throughout the month. As a result, many campaigns cross over the current “3-month” deadline for obtaining updated Registry lists. To avoid non-compliance, many members pull the Registry list monthly. For example, if you assume a company pulls the Registry list on January 1, under existing rules, that list is effective for 90 days and a lender could rely on that list until March 30. The lender can also assume it is permitted to call any number not on the list from January 1 through March 30. Lenders currently pull monthly Registry lists to deal with calling campaigns started within the Registry list update cycle. This practice ensures that a campaign started on March 15, for example, will be based on a Registry list that does not “expire” on March 30. Without accessing the Registry monthly, a calling campaign initiated on March 15 (and anticipated to run 45 days) would have to be cancelled on March 30 (only 15 days into the campaign) or rescrubbed against the new list at a significant cost.

Alternatively, lenders would have to avoid starting campaigns 45-60 days prior to the 3-month deadline, which would result in significant loss of revenue.

The same process would have to be employed under the proposed rule on a much shorter timeline. Instead of pulling a Registry list every month, the lender would have to pull the list daily or weekly to avoid crossing over the 30-day timeline. The 30-day timeline also imposes the cost of at least one or two “rescrubs” of a live campaign. The proposal presumes that a business can and would only start a calling campaign the day after the Registry is accessed. This is not practical or feasible. Some time is necessary between the date the Registry is available or accessed and the date the file becomes effective. It may take as much as a week to receive the Registry list from the Commission, scrub it against company lists, upload it to vendors, program the campaign and activate it. With the addition of weekends and holidays, the proposal would give companies approximately 10-15 business days to employ the Registry list before it expired. Businesses also need the flexibility to start campaigns throughout the month rather than cluster them around the date the Registry is downloaded. Unfortunately, the current proposal makes it prohibitive for companies to start a calling campaign mid-month or at the end of a month’s cycle. It also requires lenders to either shorten their campaign run times (which increases the number of campaigns and thus the aggregate yearly cost to use vendors) or incur the additional “rescrub” or “file suppression” expenses.

B. The Need for a 30-day Grace Period for Registry Lists

To avoid businesses having to completely alter their business models yet again, we suggest that the rule provide for a 30-day implementation or “grace period” prior to effective date of the Registry list. Our recommendation would operate in the following way: Lender receives the Registry list on March 1 and April 5 (the first Monday of every month, as recommended above). Names that appear on the Registry obtained on March 1 could not be called starting March 31, and names that appear on the April 5 Registry could not be called starting May 4. Under our proposal, therefore, an individual who places his or her name on the Registry on March 30, would stop receiving calls on May 4. Conversely under the FTC’s proposal the telemarketer would have to stop making calls to that individual on April 5, creating a need to pull updated lists daily or weekly in order to run a compliant campaign. Under MBA’s proposal, a business would be required to obtain the list every month but would be given 30 days before a number appearing on the Registry list became effective.

We believe our recommendation is fair to both businesses and consumers and is consistent with the Appropriations Act. The Appropriations Act offers considerable discretion to the FTC to provide an equitable solution to the issue because it does not specifically state when the Registry list must be “employed.” The proposal is also consistent with the operation of State do-no-call lists. State laws allow reasonable

amounts of time between the dates that the States make their do-not-call files available and the dates when the updated files become effective.

The Effective Date

The proposed rule seeks comment on the appropriate effective date of the monthly access rule. The proposed change is significant and will require adjustments to calling campaign policies, procedures and schedules, modifications to computer systems to handle more frequent downloads of the Registry list and suppression file management, adjustment of download schedules and training of personnel and vendors.

The lack of debate prior to passage of this legislative provision and the extremely short comment period has not allowed sufficient time to explore the full implications of this change. We know that many companies are still unaware of this law.

Mortgage companies also tell us that FTC's DNC Registry is not fully automated and that a number of manual steps are still required. We understand the FTC will be completing systems enhancements to fully automate the Registry within 12 months.

As a result of these considerations, we respectfully request that the FTC make the final rule effective no sooner than 12 months from its publication date. We also urge the FTC to consider issuing an "interim final rule" with another opportunity to comment. As previously stated, few companies are aware of this law or had time to provide meaningful analysis within the two-week comment period. A broader sampling of the business impact is warranted.

Conclusion

MBA believes the burden imposed on businesses far outweighs the benefit to consumers. As you are aware, the Appropriations Act provision offers no additional benefit to the 57 million consumers already registered on the DNC Registry. The provision only applies to consumers who may add their names to Registry in the future. We believe the bulk of consumers interested in curbing solicitations have already added their names to the Registry and are currently excluded from calling campaigns. Unfortunately, the proposed rule, if adopted as drafted, requires certain lenders to pull weekly lists and shorten their calling campaigns or rescrub active campaigns, which increases costs and strains resources. The shorter requirement is unfairly applied to only one segment of the mortgage lending industry, which places independent mortgage companies and mortgage brokers at a competitive disadvantage with their federally regulated counterparts. To relieve this compliance burden and lessen the competitive inequities, we urge the FTC to consider a 30-day grace period before a list becomes effective. We also recommend retaining the statutory language that gives businesses the option to pull the Registry list "monthly" or every thirty days. Finally, we ask the FTC to delay the effective date of the regulation for a minimum of 12 months.

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Thank you for considering our comments. If you have any questions, please do not hesitate to Vicki Vidal, Senior Director at 202/557-2861.

Sincerely,

A handwritten signature in cursive script, reading "Kurt Pfothauer".

Kurt Pfothauer
Senior Staff Vice President
Government Affairs